

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-120840
	:	TRIAL NO. 12TRC-3556
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
DAVID SHERIDAN,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant David Sheridan was charged with operating a vehicle while under the influence of alcohol (“OVI”) in violation of R.C. 4511.19(A)(1)(a) and speeding in violation of R.C. 4511.21. He entered not-guilty pleas and filed a motion to suppress, among other things, the results of the horizontal gaze nystagmus test (“HGN”), which the trial court overruled. A jury found Sheridan guilty of the OVI offense. The trial court sentenced him as appears of record. His sentence was stayed pending this appeal.

In a single assignment of error, Sheridan argues the trial court erred in determining that the trooper had probable cause to arrest him for OVI. He argues that the HGN test was not conducted in substantial compliance with the National Highway Traffic Safety Administration (“NHTSA”) standards and should have been suppressed. Relying upon *State v. Phoenix*, 192 Ohio App.3d 127, 129, 2010-Ohio-6009, 948 N.E.2d 468, (1st Dist.), he further argues that without the results of the HGN test, the trooper did not have probable cause to arrest him.

At the suppression hearing, the state presented a video recording of the stop, and testimony from the trooper. The trooper testified that he had substantially complied with the testing standards for the HGN test, walk-and-turn test, and one-leg-stand test, and that Sheridan had exhibited six out of six clues on the HGN test. Sheridan argues that the trial court should have suppressed the results of the HGN test given the trooper's statement on cross-examination that he may have failed to check for equal tracking and equal pupil size before beginning the HGN test, and because the trooper had performed the smooth-pursuit portion of the test in 11 seconds, instead of 16 seconds allegedly required by the NHTSA manual.

Based upon our review of the record, the case law, and the video recording of the stop, we conclude that the trooper had probable cause to arrest Sheridan for OVI and that the trial court did not err in failing to suppress the results of the HGN test. The purpose of the equal-tracking and equal-pupil-size tests is to discern whether an individual has a medical condition that would prevent him or her from performing the HGN test. *See Weiler & Weiler, Ohio Driving Under the Influence Law*, Section 7-2, 171 (2013-2014 Ed.). Prior to administering the HGN test, the trooper asked Sheridan if he had a head injury or any problems with his eyes. Sheridan told the trooper that he did not. Nor was there any evidence in the record that Sheridan suffered from a medical condition that would have impeded his ability to take the HGN test. Thus, the trooper's admitted failure to check for equal tracking and equal pupil size was de minimis, and did not require suppression of the HGN results. *See, e.g., State v. Nicholson*, 12th Dist. Warren No. CA2003-10-106, 2004-Ohio-6666, ¶ 22; *State v. Stendahl*, 12th Dist. Warren No. 2005-03-0034, 2005-Ohio-7027, ¶ 21-26. Although defense counsel questioned the trooper about the procedural requirements for conducting the HGN test, he did not ask him specifically about the timeliness of the smooth-pursuit portion of the test; he did not offer any evidence

regarding those requirements; and the trooper did not concede that he had failed to comply with the appropriate procedures for the administration of that portion of the HGN test. As a result, we conclude that the HGN test was administered in substantial compliance with the NHTSA standards.

Because the trooper administered the HGN test in substantial compliance with the NHTSA standards, this case is distinguishable from *State v. Phoenix*. Here, the trooper testified that Sheridan was driving 42 m.p.h. over the speed limit, he had admitted to coming from a bar where he had consumed four to five beers, he had a strong odor of alcoholic beverage about his person, he had bloodshot eyes, he exhibited one clue on the walk-and-turn test, he exhibited zero clues on the one-leg-stand test, and he exhibited six out of six clues while failing the HGN test. As a result, we hold that under the totality of the circumstances the trooper was in possession of sufficient facts to provide probable cause to arrest Sheridan for operating a vehicle while under the influence of alcohol. *See State v. Homan*, 89 Ohio St.3d 421, 427, 2000-Ohio-212, 732 N.E.2d 952, *superseded on other grounds by statute* as recognized in *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, 801 N.E.2d 446; *see also State v. Whitty*, 1st Dist. Hamilton Nos. C-100101 and C-100102, 2010-Ohio-5847, ¶ 15-20. We, therefore, overrule his sole assignment of error, and affirm the judgment of the trial court.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27.

DINKELACKER, P.J., FISCHER and DEWINE, JJ.

To the clerk:

Enter upon the journal of the court on January 17, 2014
per order of the court _____.

Presiding Judge